In the Supreme Court of the United States

OCTOBER TERM 1941

No. 1185

CANADIAN PACIFIC RAILWAY COMPANY,
Petitioner

v.

DENNIS SULLIVAN, ET AL,
Respondents

CANADIAN PACIFIC RAILWAY COMPANY,
Petitioner

v.

MARGARET M. SULLIVAN,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court for the District of Massachusetts, filed February 10, 1938 (R. 37, 102) is printed at page 12 of the Record and is reported in 22 Fed. Supp. 95. The opinion of the Circuit Court of Ap-

peals for the First Circuit, filed March 2, 1942 (R. 106) is printed at page 106 of the Record and is reported in 126 F. (2d) 433.

JURISDICTION

The judgment sought to be reviewed was entered March 2, 1942 (R. 106). Petition for certiorari was filed April 28, 1942. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (C. 229, §1, 43 Stat. 938).

QUESTIONS PRESENTED

1. Whether the Court below erred in holding that a Massachusetts Statute, requiring a foreign corporation doing business in the Commonwealth to appoint the Commissioner of Corporations and Taxation as its attorney for service of process, authorized such service in a transitory action of tort arising outside the Commonwealth brought by a resident against a foreign corporation doing business in the Commonwealth which had made the appointment required by Statute?

2. Whether the Court below erred in holding that the Massachusetts Statute, referred to above, is not unconstitutional under the due process clause when applied to a foreign railroad corporation which maintained an agent in the Commonwealth, who, in addition to soliciting business, sold tickets, arranged for the transportation of passengers and adjusted claims, and which also maintained a freight office in the Commonwealth?

3. Whether the Court below erred in holding that the Massachusetts Statute, referred to above, as applied to a foreign corporation doing business in the Commonwealth, did not violate the commerce clause of the Federal Constitution, if a suit by a bona fide life-long resident of

the Commonwealth on a foreign cause of action against the corporation, imposed no unreasonable burden on interstate commerce?

4. Whether the Court below erred and thereby deprived the petitioner of rights guaranteed by the Fifth Amendment, in sustaining the District Court in submitting to the jury, in accordance with established principles of the law of negligence, questions of fact relating to the negligence of the petitioner about which there was conflicting evidence?

STATUTE INVOLVED

Massachusetts General Laws, chapter 181, section 3, provides as follows:

> "Section 3. Every foreign corporation, which has a usual place of business in this commonwealth, or owns real property therein without having such a usual place of business, or which is engaged therein, permanently or temporarily, and with or without a usual place of business therein, in the construction, erection, alteration or repair of a building, bridge, railroad, railway or structure of any kind, or in the construction or repair of roads or highways, shall, before doing business in this commonwealth, in writing appoint the commissioner and his successor in office to be its true and lawful attorney upon whom all lawful processes in any action or proceeding against it may be served, and in such writing shall agree that any lawful process against it which is served on said attorney shall be of the same legal force and validity as if served on the corporation, and that the authority shall continue in force so long as any liability remains outstanding against the corporation in this commonwealth."

STATEMENT

The petitioner is a corporation organized under the laws of the Dominion of Canada with its principal place of business in Montreal, Province of Quebec (R. 11). The respondents are life long residents of Massachusetts (R. 41, 42). One of the two actions of tort consolidated on appeal was brought by Dennis and Margaret Sullivan as ascendant heirs to recover for the death of their daughter Annie, who was killed when the defendant's train struck her automobile on a public crossing in Yamachiche in the Province of Quebec. The other was brought by Margaret Sullivan to recover for personal injuries sustained in the same accident.

Service of process in both actions was made upon the Commissioner of Corporations and Taxation in Massachusetts whom the petitioner had appointed as its agent for service of process in accordance with G. L. (Ter. Ed.) C. 181, §3 (R. 4, 39, 84). Writs in trustee process were served on the Boston and Maine Railroad (R. 3, 4, 83, 84). The Boston and Maine Railroad as trustee disclosed that, at the time of service upon it, it was indebted to the petitioner in the sum of $33,962.54, and after verdicts for the respondents it was charged as trustee (R. 35). The petitioner filed Motions to Dismiss and Answers in Abatement (R. 7, 9, 87) which were overruled by a judge of the District Court who found that the petitioner was doing business in Massachusetts and had appointed the Commissioner of Corporations as its agent for service, and had agreed that the process so served should be of the same force as if served on the corporation (R. 37-40).

The petitioner maintained a passenger office in Boston in charge of one Hart, whose duties included the supervision of a staff of solicitors, the making up and issuing of tickets on the petitioner Railway and receiving pay-

ment therefor, and generally the arranging of transportation on the petitioner's Railway for those who wished to travel thereon. His chief function was to direct travel from all New England over the petitioner's lines and to that end he dealt with local ticket agents of other companies concerning travel and accommodations. The petitioner Railway paid him a salary, paid the office rent, the payroll and all the other bills contracted by its office in Boston. All money received by Hart as head of the Canadian Pacific Railway office in Boston was deposited in the corporation's bank account and he had no power to withdraw it. Complaints against the Railway were handled by Hart to some extent, but where money was involved or the complaints were of a serious nature they were forwarded to the defendant's Montreal Office. The Railway had its name listed in the Boston telephone directory and also maintained a freight office in Boston which was in charge of another employee (R. 38).

The petitioner maintained tracks in Canada which crossed the border into the United States and there crossed state lines (R. 38).

The respondents are bona fide residents of Massachu- and they, as well as the decedent, were residents of Massachusetts at the time of the accident (R. 41, 42).

The case was tried before a jury who brought in verdicts for the respondents in both actions. The petitioner's motion for a directed verdict (R. 24, 100) and its motion to set aside the verdict (R. 31) on the ground that there was no evidence of negligence on its part were denied (R. 30, 36). The petitioner appealed to the Circuit Court of Appeals where the judgment was affirmed on the grounds that the Court had jurisdiction over the petitioner (R. 110-112), that the exercise of such jurisdiction did not impose an unreasonable burden on interstate commerce (R. 112-115), and that the evidence warranted the jury in finding for the respondents on both

counts in their declarations (R. 115-119). Petition for rehearing was denied by order of the Court on March 18, 1942.

ARGUMENT

I.

The Decision of the Circuit Court of Appeals That There Was Jurisdiction Over the Petitioner Is in Accord With the Massachusetts Law.

The scope of the statute here involved is a question of Massachusetts law. Service on a foreign corporation under Massachusetts statutes may be made upon the Commissioner of Corporations and Taxation appointed by the corporation "to be its true and lawful attorney upon whom all lawful process *in any action or proceeding against it* may be served", and such service "shall be of the same legal force and validity as if served on the corporation" (G. L., c. 181, §3). Or, service may be made upon the agent actually in charge of its business "instead of upon the Commissioner" (G. L., c. 223, §38). The Massachusetts court has held that service upon an agent in charge of the business of a foreign corporation in the Commonwealth may be made in a suit on a cause of action which arises outside the Commonwealth. *Reynolds* v. *Missouri, Kansas & Texas Ry. Co.*, 224 Mass. 379, 228 Mass. 584, affirmed 255 U. S. 565; *Trojan Engineering Corp.* v. *Green Mountain Power Corporation*, 293 Mass. 377; *Stein* v. *Canadian Pacific Ry. Co.*, 298 Mass. 479. In the *Stein* case the agent of the present petitioner was found to have been engaged at the time suit was started in activities within the Commonwealth of Massachusetts identical to the activities in which he was engaged at the time the present suit was instituted. Certainly, under Massachusetts law, if there is jurisdiction in cases of foreign causes of action where

service is made upon the agent in charge of the business of a foreign corporation, the same jurisdiction exists where service is made upon the Commissioner of Corporations, the agent actually appointed by the petitioner to accept service of process on its behalf. Indeed, no other conclusion is possible in view of *Johnston* v. *Trade Insurance Co.*, 132 Mass. 432, applying a statute in all substantial particulars like G. L., c. 181, §3, to a case involving a cause of action arising outside the jurisdiction.

II.

The Exercise of Jurisdiction Over the Petitioner Does Not Deprive the Petitioner of Property Without Due Process of Law.

The District Court found that the petitioner was present in Massachusetts and that, through its agent Hart, it was selling tickets, arranging transportation, settling minor claims, and generally striving for business in the jurisdiction. It maintained a freight office, a bank account and a staff of employees. These facts are essentially the same as those in *Reynolds* v. *Missouri, Kansas & Texas Ry. Co.*, 224 Mass. 379, 385; 228 Mass. 584 which was affirmed, per curiam by this Court on the basis of *St. Louis Southwestern Ry. Co.* v. *Alexander*, 227 U. S. 218, *sub nomine*, *Missouri, Kansas & Texas Ry. Co.* v. *Reynolds*, 255 U. S. 565 holding that Massachusetts' exercise of jurisdiction was not unconstitutional. On the facts of this case the petitioner was "doing business in Massachusetts" (R. 39), *Stein* v. *Canadian Pacific Railway Co.*, *supra*, *St. Louis, Southwestern Railway* v. *Alexander*, 227 U. S. 218, *Missouri, Kansas & Texas Railway* v. *Reynolds*, 255 U. S. 565, *Hutchinson* v. *Chase & Gilbert, Inc.*, 45 F. (2d) 139, and not merely "soliciting" in that Commonwealth. See *Green* v. *Chicago, Burling-*

ton & Quincy Ry. Co., 205 U. S. 530, *Thurman* v. *Chicago, Milwaukee & St. Paul Railway*, 254 Mass. 569.

The petitioner having appointed an agent for service of process in Massachusetts thereby accepted the construction, consistent with constitutional guarantees, which that jurisdiction puts on the applicable statute and the scope of the agency. *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining and Milling Co.*, 243 U. S. 93, 96; *Mitchell Furniture Co.* v. *Selden Breck Construction Co.*, 257 U. S. 213, 215. Such a "stipulation is . . . a true contract. The person designated is a true agent. The consent that he shall represent the corporation is a real consent." See *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 175 citing *Bagdon* v. *Philadelphia & Reading C. & I. Co.*, 217 N. Y. 432, 436.

In the District Court the respondents' motion to charge the trustee, Boston and Maine Railroad, was allowed (R. 35). The Boston and Maine Railroad disclosed that at the time of service upon it it was indebted to the petitioner in the sum of $33,962.54 and it was charged by the District Court as trustee (R. 35). Consequently, there existed jurisdiction *quasi in rem* over the petitioner. The petitioner has made no contention that to subject its property in the Commonwealth of Massachusetts to the jurisdiction of the court in the present case violates the requirements of due process of law.

III.

THE CIRCUIT COURT OF APPEALS APPLIED THE PROPER STANDARD IN DETERMINING THE CONSTITUTIONALITY OF THE APPLICABLE STATUTE UNDER THE COMMERCE CLAUSE.

The petitioner does not question the application of the principle relied on by the Court below to the facts of this case, but contests only the validity of the principle itself. See *Petition*, p. 16.

The Court below said:

> "The question in *cases of this sort* is not whether the requirement that a foreign carrier shall submit to suit in a state imposes some burden on interstate commerce; it is whether that requirement imposes an unreasonable burden upon such commerce." (R. 112)

This principle, followed by the Circuit Court of Appeals, has long been settled law. *International Milling Company* v. *Columbia Transportation Company*, 292 U. S. 511; *St. Louis, B. & M. Ry. Co.* v. *Taylor*, 266 U. S. 200, 207. See *Davis* v. *Farmers Co-operative Equity Co.*, 262 U. S. 312, 315; *Michigan Central R.R.* v. *Mix*, 278 U. S. 492, 495; *DiSanto* v. *Penn.*, 273 U. S. 34, 39, 40; *South Carolina Highway Department* v. *Barnwell Bros.*, 303 U. S. 177, 184, 190. *Cf. Crutcher* v. *Kentucky*, 141 U. S. 47, 61; *Buck* v. *Kuykendall*, 267 U. S. 307, 315; *California* v. *Thompson*, 313 U. S. 109, 113.

Residence is an important element in determining the question of reasonableness of burden, *Davis* v. *Farmers Co-operative Equity Co.*, 262 U. S. 312; *Cressey* v. *Erie R.R.*, 278 Mass. 284; *Stein* v. *Canadian Pacific Ry.*, 298 Mass. 479, and "a factor of high significance", *International Milling Company* v. *Columbia Transportation Company*, 292 U. S. 511, 517. The respondents and the deceased were residents of the Commonwealth of Massachusetts at the time the cause of action arose and the respondents still are bona fide residents of the forum. Never has it been held that to avoid burdening interstate commerce, a life-long bona fide resident of the forum must seek his remedy not at home, but in a foreign country, against a foreign corporation which is actually doing business in the state of the plaintiff's residence and has there appointed an agent to accept service of process.

Nor does the Massachusetts statute levy a fee on foreign corporations or purport to exclude them for failure to comply with the provisions of G.L. (Ter. Ed.) c. 181, §3; see *Rogers & Co.* v. *Simmons*, 155 Mass. 259.

IV.

The Decision of the Circuit Court of Appeals Applies Recognized Principles of the Law of Torts and Evidence.

In its brief, points 5 and 6, the petitioner argues that the decision of the Circuit Court of Appeals on the merits of this case deprives it of constitutional rights and in effect constitutes a legal anomaly. A reading of the decision demonstrates that the Court in deciding the issue as to the propriety of the refusal of the trial judge to direct a verdict in the petitioner's favor followed the usual rule of viewing the entire evidence in the case in its aspects most favorable to the plaintiff, and then applied well settled rules governing liability for negligent conduct. A line of decisions in Massachusetts and Canada settles the question that the evidence in this case (R. 42, 43) warranted a finding that the signals required by statute and rule were not given. *Menard* v. *Boston and Maine Railroad,* 150 Mass. 386; *Slattery* v. *N. Y., N. H. & H. R.R. Co.,* 203 Mass. 453; *Hough* v. *Boston Elevated Ry. Co.,* 262 Mass. 91; *Eisenhauer* v. *Boston and Maine Railroad,* 285 Mass. 439; *Lane* v. *Boston and Maine Railroad,* 288 Mass. 277; *Gaboriault* v. *N. Y., N. H. & H. R.R.,* 289 Mass. 36; *Reynolds* v. *Canadian Pacific Railway Co.* (1927), 3 D.L.R. 888. Responsibility for the proximate consequences of the failure to give such required signals certainly does not entail any application of the doctrine of liability without fault as the petitioner here suggests. The failure of the petitioner's employees even to slow down the train (R. 65, 66) with a stalled car on the track in their clear view after rounding a curve three thousand feet away (R. 62, 67) permitted a rational inference by the jury of negligence on their part. *Storry* v. *Canadian National Railway* (1940), 3 D.L.R. 554; *Hunt* v. *Boston and Maine Railroad,* 250 Mass. 434.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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May, 1942.